INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Anderson's Estate **v.** ***Commissioner,*** **126 F. 2d 46, certiorari denied, 317 U. S. 653**	6, 7, 8
Ardenghi **v.** ***Helvering,*** **100 F. 2d 406, certiorari denied, 307 U. S. 622**	6
Bank of Richmondville **v.** ***Graves,*** **259 App. Div. 4, affirmed, 284 N. Y. 671**	7
Blair **v.** ***Commissioner,*** **300 U. S. 5**	9
Burchenal **v.** ***Commissioner,*** **150 F. 2d 482**	6
Burnet **v.** ***Whitehouse,*** **283 U. S. 148**	6, 8, 9
Carlisle **v.** ***Commissioner,*** **165 F. 2d 645**	9
Dunlop **v.** ***Commissioner,*** **165 F. 2d 284**	6
Freuler **v.** ***Helvering,*** **291 U. S. 35**	8, 9
Helvering **v.** ***Pardee,*** **290 U. S. 365**	6
Helvering **v.** ***Stuart,*** **317 U. S. 154**	8
Lyeth **v.** ***Hoey,*** **305 U. S. 188**	7, 8
Rogers' Estate, In re, **143 F. 2d 695, certiorari denied, 323 U. S. 780**	6, 7
Weigel **v.** ***Commissioner,*** **96 F. 2d 387**	9

Statute:

Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 161	2, 5
Sec. 162	3, 5, 6, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 757

CHARLES SIMON AND HERMAN T. WARSHOW, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD J. CORNISH, DECEASED, PETITIONERS

v.

JANE M. HOEY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES J. HOEY, DECEASED, FORMERLY COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE SECOND DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 114-133) is reported at 88 F. Supp. 754. The *per curiam*

opinion of the Court of Appeals (R. 140) is reported at 180 F. 2d 354.

JURISDICTION

The judgment of the Court of Appeals was entered January 30, 1950. (R. 141.) The petition for a writ of certiorari was filed April 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether capital gain realized by an estate in the course of its administration, and distributed to the residuary legatee as part of the corpus of the legacy, is taxable to the estate or to the legatee under Section 162(c) of the Revenue Act of 1938.

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary * * *.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT

The facts as stipulated (R. 27-34) and found by the District Court (R. 114-118) may be summarized as follows:

The decedent, Edward J. Cornish, died a resident of the State of New York on May 3, 1938. By his will he bequeathed his entire residuary estate to

his widow, who survived him by about two weeks. The will was silent as to the disposition of any income earned or realized by the estate during the period of administration. (R. 114.)

During the first fiscal year of the estate, ending April 30, 1939, the executors sold certain assets of the estate, as a result of which the estate realized net capital gains of $504,378.95. These gains were deposited by the executors in a separate bank account. On March 29, 1939, the executors distributed to the widow's estate, as residuary legatee, $483,126.51 of the capital gains. (R. 115-116.)

In October of 1940, the executors filed in the Surrogate's Court of New York an account of their proceedings. In that accounting the capital gain of $504,378.95 realized by the estate was charged to "Principal", and the $483,126.51 distributed therefrom to the residuary legatee was credited to "Principal". The account filed by the executors contained separate schedules relating to "Income", and the capital gain distributed was not included in any of those schedules. The account was judicially settled and allowed as filed. (R. 116-117.)

Prior to filing an income tax return for the estate, the executors requested from the Commissioner of Internal Revenue a ruling as to whether the capital gain distributed to the residuary legatee was taxable to the estate or to the legatee, and the Commissioner ruled that it was taxable to the estate. (R. 93-99, 117.) Thereafter the executors filed a return on behalf of the estate in which the

capital gain was included as income, without deduction for the portion paid to the residuary legatee. A claim for refund was duly filed and, upon its rejection, this suit for refund was instituted. (R. 117-118.)

The executors contended that the amount of capital gain distributed to the residuary legatee was deductible from the estate's income and taxable to the residuary legatee under Section 162(c) of the Revenue Act of 1938, *supra,* p. 3. The District Court held that the amount had been distributed to the residuary legatee as corpus, not as income, and that therefore the estate rather than the legatee was taxable on the amount under Section 162(c). (R. 118-133.) The Court of Appeals affirmed *per curiam.* (R. 140.)

ARGUMENT

1. By Sections 161 and 162 of the Revenue Act of 1938, *supra,* pp. 2-3, a decedent's estate is treated for income tax purposes substantially the same as an individual with respect to income realized during the period of administration. However, Section 162(c), *supra,* provides that in computing the net income of the estate there shall be allowed as an additional deduction "the amount of the income of the estate * * * which is properly paid or credited * * * to any legatee * * * but the amount so allowed as a deduction shall be included in computing the net income of the legatee * * *."

The plain purpose of Section 162(c) is to tax income realized by an estate during the period of administration either to the estate or to the legatees. If the income is "properly paid or credited" to a legatee as "income", it is deductible by the estate and includible in the gross income of the legatee. On the other hand, if it is distributed to the legatee as part of the principal or corpus of the legacy, it is taxable to the estate rather than to the legatee. As several circuits have already held, the issue of whether estate income is distributed to the legatee as income, or as corpus, depends on the terms of the will and the law of the state where the estate is being administered. *In re Rogers' Estate,* 143 F. 2d 695, 696 (C. A. 2), certiorari denied, 323 U. S. 780; *Anderson's Estate* v. *Commissioner,* 126 F. 2d 46, 47-8 (C. A. 9), certiorari denied, 317 U. S. 653; *Burchenal* v. *Commissioner,* 150 F. 2d 482, 485 (C. A. 6); *Dunlop* v. *Commissioner,* 165 F. 2d 284, 287 (C. A. 8); cf. *Burnet* v. *Whitehouse,* 283 U. S. 148; *Helvering* v. *Pardee,* 290 U. S. 365; *Ardenghi* v. *Helvering,* 100 F. 2d 406 (C. A. 2), certiorari denied, 307 U. S. 622.

The estate income here in question consists of capital gains distributed to a residuary legatee. The will is silent as to the disposition of income realized by the estate during administration, and under the law of New York, where the estate is being administered, a distribution of capital gain by an estate to a residuary legatee constitutes a

distribution of corpus, not of income. *Bank of Richmondville* v. *Graves,* 259 App. Div. 4, affirmed, 284 N. Y. 671; *In re Rogers' Estate,* 143 F. 2d 695, 696 (C. A. 2), *supra.* Moreover, the executors accounted for the distribution as a payment of principal, and the distribution was judicially approved by the Surrogate's Court as such. (R. 114-117.) Applying the provisions of Section 162 (c) and these established principles, the courts below correctly held that the capital gain was taxable to the estate rather than to the residuary legatee, since it was paid to the legatee as principal and not as income.

The contentions made by the estate in its petition for certiorari are essentially the same as those advanced in the petitions for certiorari in the *Rogers' Estate* and *Anderson's Estate* cases, *supra.* Nothing has occurred since the denial of certiorari in those cases which calls for further review of this case.

2. Taxpayer's assertion of conflict (Pet. 11-12, Br. 15-16) with *Lyeth* v. *Hoey,* 305 U. S. 188, is without substance. This Court there held that "property" received by an heir from an estate, in compromise of a will contest, was acquired by "inheritance" within the meaning of Section 22(b)(3) of the Revenue Act of 1932, c. 209, 47 Stat. 169, which excluded from the definition of gross income (as contained in Section 22(a)) "The value of property acquired by gift, bequest, devise, or in-

heritance". Accordingly, it was held that the property was not includible in the gross income of the heir. Far from being in conflict with the *Lyeth* case, the decision below is in harmony with it. Since the amount here in question was distributed to the residuary legatee as corpus ("property"), the courts below properly held that it was not taxable to the legatee, but to the estate. See *Anderson's Estate* v. *Commissioner,* 126 F. 2d 46 (C. A. 9), certiorari denied, 317 U. S. 653, and the other cases cited *supra,* p. 6.

True, as taxpayer emphasizes, this Court in the *Lyeth* case held that what is includible or excludible as taxable income is governed by the federal taxing statute, not by local law. But we are not here concerned with the question of *whether* the income is subject to tax; admittedly the capital gain in question constitutes taxable income either to the estate or to the legatee. Rather, we are here concerned with *who,* as between the estate and the legatee, is taxable on that income. Under Section 162(c) of the federal taxing statute, the answer depends upon whether the income was "properly paid" to the legatee as "income", or as corpus. Here, as in other instances, the controlling federal statutory provision by "necessary implication" makes the tax incidence turn on the terms of the will or trust as interpreted by the applicable state law. *Helvering* v. *Stuart,* 317 U. S. 154, 161-163; *Freuler* v. *Helvering,* 291 U. S. 35; *Burnet* v. *Whitehouse,*

283 U. S. 148; *Blair* v. *Commissioner,* 300 U. S. 5. Thus, in *Burnet* v. *Whitehouse, supra,* this Court held that even though an amount distributed by a testamentary trust represented trust income, it was not taxable to the beneficiary because under the terms of the will it was a charge upon the whole estate and thus was paid as corpus. In the instant case the capital gain which the executors distributed to the residuary legatee likewise was paid as corpus.[1]

3. Nor is the decision below in conflict with *Freuler* v. *Helvering,* 291 U. S. 35, as taxpayer asserts. (Pet. 11-12, Br. 17-18.) On the contrary, this Court there held (pp. 43-45) that local law was determinative of whether trust income was "distributable" to a beneficiary within the meaning of Section 219 of the Revenue Act of 1921, c. 136, 42 Stat. 227, the predecessor of Section 162 of the Revenue Act of 1938 here involved. As for *Weigel* v. *Commissioner,* 96 F. 2d 387 (C. A. 7), upon which taxpayer also relies for conflict (Pet. 12, Br. 22-23), taxpayer merely quotes a brief and unclear portion of the opinion which avowedly

---

[1] Section 162 of the Internal Revenue Code, corresponding with the same Section of the 1938 Act here involved, was amended in several respects by Section 111 of the Revenue Act of 1942, c. 619, 56 Stat. 798. By Section 111(e) of the 1942 Act the amendments were made effective for taxable years beginning after 1941. Whatever the changes enacted by these amendments (see *Carlisle* v. *Commissioner,* 165 F. 2d 645 (C.A. 6)) they are not applicable to the taxable year (1939) here involved.

(Pet. 12) is *dictum*. The decision in that case, as well as most of the opinion, confirms the correctness of the holding below, as petitioner impliedly admits (Pet. 25).

CONCLUSION

The decision below is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
HARRY BAUM,
Special Assistants to the Attorney General.

MAY, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 888437 702